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In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 1012

FRANK E. LIPP AND BETTY FRIEDMAN, EXECUTRIX OF THE ESTATE OF JOSEPH FRIEDMAN, DECEASED, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinions of the Court of Claims (*Lipp*, Pet. A1-A49; *Friedman*, Pet. A51-A92) are reported at 301 F. 2d 674 and 310 F. 2d 381.

JURISDICTION

The judgment of the Court of Claims dismissing petitioner Lipp's claim was entered on April 4, 1962, and a motion for rehearing was denied on November

7, 1962. A subsequent motion for reconsideration was denied on January 11, 1963. The petition for a writ of certiorari was filed on April 11, 1963. The jurisdiction of this Court is invoked under 28 U.S.C. 1255(1).

The judgment of the Court of Claims dismissing petitioner Friedman's claim was entered on November 7, 1962, and a motion for rehearing was denied on January 11, 1963. The petition for a writ of certiorari was filed on April 11, 1963. The jurisdiction of this Court is invoked under 28 U.S.C. 1255(1).

QUESTION PRESENTED

Whether the Court of Claims correctly ruled that petitioners' claims for military disability retirement pay were barred by the statute of limitations (28 U.S.C. 2501) because the suits were filed more than six years after the Secretary first denied applications for the disability determination and the benefits derived therefrom.

STATUTE INVOLVED

Title 28 of the United States Code, Section 2501, provides in pertinent part:

> Time for Filing Suit.
>
> Every claim of which the Court of Claims has jurisdiction shall be barred unless the petition thereon is filed within six years after such claim first accrues.

STATEMENT

Petitioners ask this Court to review decisions of the Court of Claims dismissing their suits to recover military disability retirement pay. In each case, the court below determined that the action was barred by the six year limitations period established by 28 U.S.C. 2501. The relevant facts are as follows:

Lipp. On January 26, 1946, having served as an Army medical officer throughout World War II, petitioner Lipp was released from active duty by reason of demobilization, not for physical disability (F. 1, Pet. A5-A6). He was honorably discharged from the Officers' Reserve Corps on December 12, 1952 (F. 1, Pet. A6). During his active military service, Dr. Lipp never sought examination for physical disability, nor did he request an appearance before an Army disposition board or a retiring board. At the time of his release from active duty, he thought himself to be in good health, physically fit to perform his duties (F. 12, Pet. A10).

By letter dated December 19, 1948, Dr. Lipp informed the Adjutant General that he was receiving a pension from the Veterans' Administration for multiple sclerosis and requested an appearance before a "medical retirement Board." On December 30, 1948, the Adjutant General replied that no retiring board would be convened unless Dr. Lipp presented evidence tending to show that, when released, he was suffering from a physical defect, related to his military service, which permanently incapacitated him

for active military duty (F. 23, Pet. A17-A18). On May 26, 1949, Dr. Lipp again requested an Army retiring board (F. 24, Pet. A18). Upon the Surgeon General's unfavorable recommendation (F. 24, Pet. A18), the Adjutant General on July 18, 1949, denied the request (F. 24, Pet. A18-A19). Dr. Lipp renewed his request on June 16, 1950, and, on July 13, 1950, it was again denied (F. 25, Pet. A19). Thereafter, on December 1, 1951, he applied to the Army Board for Correction of Military Records for a correction of his records to show "Disability retirement for Service connected diagnosis of Multiple Sclerosis" (F. 26, Pet. A19). On October 10, 1952, at the request of the Board, the Adjutant General informed him that the evidence presented failed to establish sufficient basis for a hearing and that, in the absence of additional evidence, no further action on the application was contemplated (F. 26, Pet. A20).

On March 15, 1954, Dr. Lipp filed a second application with the Correction Board, enclosing additional evidence with respect to his alleged disability [1] (F. 27, Pet. A21-A22). After a hearing, the Correction Board, concurring in the Surgeon General's opinion that the multiple sclerosis had antedated Dr. Lipp's military service, recommended denial of his application on October 31, 1955 (F. 28, Pet. A28-

[1] For the evidence with respect to petitioner's disability, not here at issue, see F. 5, Pet. A7; F. 6, Pet. A7- A8; F. 7, Pet. A8; F. 18, Pet. A12; F. 19, Pet. A13- A15; F. 28, Pet. A23- A28.

A30). The application was finally denied by the Assistant Secretary of the Army on November 17, 1955 (F. 29, Pet. A30).

Dr. Lipp filed his petition in the Court of Claims on August 22, 1958 (Pet. A5) asserting the alleged arbitrary and capricious action of the Correction Board in 1955 (Pet. A1, A2). The court held that, more than six years having elapsed between the denials of his requests for appearance before an Army retiring board and the filing of suit, the claim was barred by the statute of limitations (Pet. A4-A5). A motion for rehearing was denied on November 7, 1962 (Pet. A50). A subsequent motion for reconsideration, filed after the decision in *Friedman*, was denied on January 11, 1963 (Pet. A50).

Friedman.[2] Petitioner's testator, Dr. Joseph Friedman, served on active duty as an Army medical officer from January 9, 1941, to January 30, 1947. During this time, Dr. Friedman suffered periodic, serious illnesses with resultant hospitalization. During the years 1944-1946 a series of boards evaluated his capacity for continued service, the last of which, a retiring board, on October 25, 1946, concluded that he was not permanently incapacitated for active service. However, the retiring board recommended that Dr. Friedman be placed on temporary, limited duty for a period not to exceed six months after which reexamination and reevaluation were to take place. This was not done and he was

[2] The *Friedman* case was decided on cross motions for summary judgment. The facts are taken from the court's opinion (Pet. A51- A52) and are not in dispute.

released, at his own request, on January 30, 1947, not for physical disability.

After his separation in January, 1947, Dr. Friedman made no request of the Army and did nothing further to obtain disability retirement pay during the remainder of his life.[3] He died on October 4, 1958. Thereafter, on March 18, 1960, petitioner applied to the Board for Correction of Military Records for a determination that Dr. Friedman had been entitled to disability retired pay when he was released from active duty in January, 1947. This application was denied on August 17, 1960.

On September 30, 1960, petitioner filed a petition in the Court of Claims suing for the disability retirement pay alleged to have been arbitrarily denied Dr. Friedman. Ruling on cross motions for summary judgment, the court concluded that, the cause of action having accrued upon the determination by the retiring board in 1946, the suit was barred by the six-year limitation prescribed by 28 U.S.C. 2501 (Pet. A88-A89). A motion for rehearing was denied on January 11, 1963 (Pet. A93).

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[3] It was asserted below that in December, 1946, in response to an official request for an indication from him of his preference between temporary, limited duty and immediate separation, Dr. Friedman wrote to Walter Reed Hospital asking that he be recalled to active duty at the end of the six months for reexamination and reevaluation. This assertion was disputed. While purported copies were produced from Dr. Friedman's office, neither the Walter Reed files nor those of the Adjutant General's Office contained any such communication.

ARGUMENT

In holding the present suits barred by the six-year limitation prescribed by 28 U.S.C. 2501 the court below correctly applied settled principles of law to the circumstances of each case. The rulings do not conflict with decisions of this or any other court. Accordingly, no question is presented meriting review by this Court.[4]

The allegation that the decisions in these cases radically depart from the otherwise settled jurisprudence of the Court of Claims is particularly inappropriate in the face of the careful and unanimous opinion in *Friedman* which painstakingly examines each of the prior decisions and distills from that body of precedent the rule applied here. Contrary to petitioner's claim, the court has *not*, in these cases, upset the settled principle that the statute of limitations begins to run from the time of arbitrary action by the Service, rather than from the date of separation.[5] The rule stated is simply that the cause accrues upon

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[4] Insofar as it relates to the petitioner Lipp, the petition, filed more than 90 days after denial of the first motion for rehearing, is probably untimely. See *Gypsy Oil Co.* v. *Escoe*, 275 U.S. 498. The subsequent motion for reconsideration was expressly filed under Rule 54(b) of the Rules of the Court of Claims which, by its own terms, does not affect the finality of the judgment.

[5] Normally, as here, entitlement to disability retirement benefits is administratively determined *before* separation. Since the right depends upon ability to perform military duties at that time, it would be reasonable to hold that the judicial cause accrues, at the latest, upon separation and that a suit for retirement disability benefits must be filed within six

the Secretary's *first* definitive action denying relief. Nor has the court held, as petitioners contend, that the action of a Correction Board is never reviewable, or even that denial of relief by such a board is never the first definitive action which matures the judicial claim. On this point, the decisions below simply hold that an application to the Correction Board does not toll the statute of limitations when the Service has already finally rejected a disability claim. The limitations rule is fully stated in the *Friedman* opinion (Pet. A74-A75):

> *Summary*: As our discussion has shown, the main course of the court's decisions on the time-bar in the disability retirement field reveals a well-structured design:
>
> (*a*). The judicial claim for disability retirement pay does not accrue on release from active duty but rather on *final* action of a board competent to pass upon eligibility for disability retirement (or upon refusal of a request for such a board).
>
> (*b*). Normally, the Retiring Board is the proper board, but where the claimant has not had or sought a Retiring Board, his claim does not accrue until final action by the Correction Board (which in that instance stands in the place of the Retiring Board as the proper tribunal to determine eligibility for disability retirement).
>
> (*c*). A board's action (or failure to act) is not final if (i) the claimant has been misled, (ii) the board's decision is tentative and invites reopen-

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years thereafter. Indeed, the government so urged in *Harper* v. *United States*, 310 F.2d 405 (Ct. Cl.). But, quite obviously, such a rule would not avail the present petitioners.

ing, (iii) the armed service itself reopens the case, or (iv) there are other circumstances depriving the action or non-action of finality.

(*d*). Once a final decision is had, the claim accrues, the limitations period begins to run, and there is no tolling of the statute by reason of further applications to other boards or agencies (including the Correction Board).

(*e*). Once a final decision is had, adverse determinations by other boards, including the Correction Board, do not give rise to a new cause of action.

(*f*). A claim for entitlement to disability retirement status and pay—of the type requiring discretionary action by a board and the Secretary—is not a "continuing claim" but accrues as a whole (once it accrues). However, other types of pay claims not dependent on a board finding—including claims for increased retirement pay because of new legislation, etc.—are "continuing" claims.

There is in this nothing new. Undoubtedly, the limitations principles are now stated with rare clarity and completeness, but the result is in harmony with the main body of decisions by the Court of Claims. The present rulings implement the recognized principle that, while the judicial claim arises only when the appropriate Secretary acts arbitrarily (*Furlong* v. *United States*, 138 Ct. Cl. 843), the underlying right to disability retirement benefits [6] sup-

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[6] Act of April 3, 1939, §5, 53 Stat. 557, as amended, 10 U.S.C. (1946 ed.) 456; R.S. §§1245-53, 10 U.S.C. (1946 ed.) 931, 933-34, 961-66. R.S. §§ 1245, 1251-53, were repealed by

ports no more than one cause of action, which "first accrues" (28 U.S.C. 2501) when the right is, for the first time, finally denied by administrative action. Whether the Secretary first acts through a Retiring Board, a Disability Review Board, or a Correction Board, or by refusing to convene one of these boards, depends on the particular circumstances of each case.[7] But, whatever the means, once he has finally denied the claim, his action becomes judicially reviewable, and while further administrative consideration may be available, it is neither necessary to seek it (*Ogden* v. *Zuckert*, 298 F.2d 312 (C.A.D.C.)), nor will the subsequent application toll the statute of limitations.

Plainly, there is no occasion to review the principles announced in the decisions complained of. Nor is there reason to question their application here. In *Lipp* the Army had finally rejected the disability claim on July 18, 1949, by refusing to convene a Retiring Board, more than nine years before the suit was filed. In *Friedman* a Retiring Board denied the claim on October 25, 1946, more than fourteen years

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the Act of October 12, 1949, §531(b), 63 Stat. 838, and replaced by §§401-15, 63 Stat. 816-25, 37 U.S.C. (1952 ed.) 271-85. When Title 10 of the Code was revised, and enacted into law in 1956, these provisions were repealed, Act of August 10, 1956, § 53, 70A Stat. 641, and were replaced by the present 10 U.S.C. 1201-21, as amended.

[7] See *e.g.*, *Harper* v. *United States*, *supra*, where the disability claim was first finally rejected by the Correction Board and the court held a suit filed within six years thereafter timely.

before the suit was filed.[8] Having failed to seek timely judicial review of the administrative action, both petitioners were properly held barred by limitations when they ultimately sought relief in the Court of Claims.

CONCLUSION

For the reasons stated, we respectfully submit that the petition for a writ of certiorari should be denied.

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[8] The Board's rejection of the claim became final, at the latest, when Dr. Friedman, without excuse, failed to request reexamination and reevaluation within six months, as suggested by the board.

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